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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SANDRA KAY HILL,

Defendant and Appellant.

2d Crim. No. B212445
(Super. Ct. No. 2007044998)
(Ventura County)

Sandra Kay Hill appeals an order granting formal probation following her conviction of two counts of inflicting corporal injury on a cohabitant and one count of misdemeanor child abuse. (Pen. Code, §§ 273.5, subd. (a), 273a, subd. (b).) We affirm.

FACTS AND PROCEDURAL HISTORY

Hill and Arthur Apodaca had dated for many years. In April 2007, she moved into his Oxnard home and rented her home to a tenant. Hill and Apodaca held title to the two properties as joint tenants.

Shortly after Hill moved, she and Apodaca argued regarding refinancing the Oxnard home. In May or June 2007, they ended their relationship; Apodaca moved into the upstairs area of the home and Hill lived in a downstairs bedroom. In September 2007, Apodaca invited Amy A., a former girlfriend, and her two children to live in the home. Amy and her children had been evicted from their residence and were homeless. Apodaca did not consult Hill prior to inviting Amy to live in the home.

In the evening of November 28, 2007, Hill shouted at Apodaca when he returned home from working. He ignored her and went upstairs.

Later that evening, Amy and the two children returned home after grocery shopping. A tutor for the children joined them. When the tutor remarked favorably regarding the kitchen, Hill shouted "Shut the fuck up, bitch." Amy asked Hill not to speak to the tutor in that manner. Hill responded that Amy was "a slut" and "a whore." Amy shouted for Apodaca to come downstairs and the tutor left the home.

Hill entered the kitchen and pushed Amy's son K., as he prepared to cook dinner. She then approached Amy, but K. stepped between the two women "to stop things from escalating." Hill pushed K. and punched him in the face three times, causing a bloody nose. K. described Hill as "drunk and really mad."

Apodaca entered the kitchen, approached Hill from behind, and placed his arms around her to restrain her. Hill bit him twice on the wrist, and he released her. She then picked up a chair and swung it at Apodaca. He deflected the chair and it damaged the kitchen island. Hill picked up a second chair and swung it at him. The chair struck the side of his face, causing a black eye and swelling.

Apodaca requested Amy's son, T., to retrieve his telephone so that he could summon police assistance. When T. brought him the telephone, Hill slapped T. Apodaca telephoned for police assistance and reported that Hill bit him and struck the children.

Oxnard Police Officer Michael Robinson responded to the call. He observed that Apodaca suffered a large bite wound on his wrist and swelling on the right side of his face, and that K.'s face was red and swollen. Hill denied striking the children or biting Apodaca. She informed Robinson that she struck Apodaca with a chair after he pushed her to the floor following an argument regarding finances.

At trial, Hill testified that Amy was behaving aggressively toward her. She denied that she pushed or struck K. She stated that she bit Apodaca when he grabbed her and pushed her to the ground. She then grabbed a chair and swung it at him

because she thought he would strike her. In response, Apodaca grabbed a chair and struck her with it. Hill stated that she suffered bruises and injured her knee from the incident.

The prosecutor presented evidence that Hill was involved in a prior incident of domestic violence. Oxnard Police Officer Martin Cook testified that on June 13, 2003, he responded to a call involving Hill's parents. Cook observed that Hill's mother, Louise Gunn, had bruises on her forearm, chest, and back. Hill initially denied striking her mother, but later admitted that she hit her and pushed her to the floor. Hill explained that her mother approached her from behind and that she pushed back, knocking her to the floor. On January 5, 2004, Hill pleaded nolo contendere and was convicted of misdemeanor elder abuse. (Pen. Code, § 368, subd. (c).) The trial court granted her 36 months of probation.

At trial, Hill testified that the incident with her mother occurred because she believed her mother was not caring for her father. Hill denied striking her mother or pushing her to the floor. She stated that her mother did not suffer injuries and police photographs of her mother's bruises were from a prior fall.

In rebuttal, the prosecutor elicited testimony from Officer Cook that Mrs. Gunn informed him that Hill struck her several times with a closed fist, knocking her to the ground. When Mrs. Gunn telephoned for police assistance, Hill took the telephone and threw it across the room.

The jury convicted Hill of two counts of inflicting corporal injury to a cohabitant and one count of misdemeanor child abuse (count 3, injuries to K.). It acquitted her of misdemeanor child abuse against T. (count 4). The trial court suspended imposition of sentence and granted Hill 48 months of formal probation with terms and conditions, including 210 days of confinement in county jail and payment of fees, fines, and victim restitution.

Hill appeals and contends that the trial court erred by: 1) admitting evidence of her prior misdemeanor conviction for elder abuse, and 2) permitting evidence of Mrs. Gunn's hearsay statements regarding the incident.

DISCUSSION

I.

Hill argues that the trial court erred by admitting, over defense objection, evidence of her conviction for domestic violence. She asserts that the court did not consider and analyze the factors set forth in Evidence Code section 352 -- the undue prejudice of the evidence, undue consumption of time, danger of confusing issues, and danger of misleading the jury.¹ Hill points out that the trial judge discussed only the relevance of the evidence, when he stated that "it seems to be highly probative in that there apparently will be a substantial issue who did what to whom, and so that kind of evidence seems to me is extremely highly probative in this particular case." She adds that the trial record does not establish that the court weighed any undue prejudice against the probative value of the evidence. (*People v. Leonard* (1983) 34 Cal.3d 183, 187 [record must affirmatively show trial court weighed prejudice against probative value].) Hill contends that the prior domestic violence incident is remote in time, involved a different relationship, and was unduly prejudicial.

Section 1109, subdivision (a)(1) provides that "[e]xcept as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Section 352 permits the trial court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

¹ All further statutory references are to the Evidence Code.

The trial court possesses broad discretion to determine whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion, or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "Prejudice" within the meaning of section 352 pertains to evidence tending to evoke an emotional bias against a party, with little relevance to the issues. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.) Thus, section 352 precludes prejudging a person or cause based upon extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) A trial court need not expressly weigh prejudice against probative value or expressly state that it has done so, as long as the record as a whole reflects that the court was aware of and performed the section 352 balancing requirement. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.)

Here the record as a whole reflects that the trial court performed its balancing function pursuant to section 352. In a hearing outside the jury's presence, the court heard defense argument regarding the remoteness of the prior domestic violence conviction, its tendency to confuse the issues, and its undue prejudice to Hill. Hill's attorney argued that the "probative value is absolutely minimal and the prejudicial potential is much greater. So if you weigh it, I think that you'll find that [it] should be excluded." This hearing followed a previous hearing pursuant to section 352 regarding the police emergency dispatch call. Although the court did not expressly reference its balancing assessment, the law does not require that it do so. (*People v. Taylor, supra*, 26 Cal.4th 1155, 1169.)

Moreover, the trial court did not abuse its discretion by permitting evidence of the prior incident. The circumstances of the prior incident are no more inflammatory than the charged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [potential for prejudice lessened where evidence of uncharged acts no more inflammatory than evidence of charged offenses].) Also, Hill pleaded nolo contendere to the prior charge and this circumstance decreased the potential for prejudice. (*People v. Balcom* (1994) 7 Cal.4th 414, 427 [where uncharged acts result in criminal

conviction, jury not tempted to convict defendant regardless of guilt to ensure punishment for uncharged acts].) The prior incident also occurred only four years prior to the charged offenses and likewise involved a victim with whom Hill had a longstanding relationship.

II.

Hill contends that the trial court erred by permitting Officer Cook to testify over defense objection regarding his interview with Mrs. Gunn (now deceased) in June 2003. She concedes that the court instructed that Cook's rebuttal testimony was admitted "for the limited purpose of impeachment of [Hill]." Hill argues that Gunn's statements are inadmissible pursuant to the hearsay rule, section 352, and the constitutional rights to due process of law and to confront witnesses. She claims the error is not harmless beyond a reasonable doubt.

The trial court improperly admitted Officer Cook's testimony for the hearsay purpose of establishing the nature of Hill's assault upon her mother. Nevertheless, the error is harmless beyond a reasonable doubt. (*People v. Cage* (2007) 40 Cal.4th 965, 991-992 [standard of review].) Cook's testimony briefly expanded upon his previous testimony that Hill admitted striking her mother and pushing her to the floor. His rebuttal testimony amounted to three and one-half pages of reporter's transcript among approximately 350 pages of evidence. Indeed, Hill refers to the rebuttal evidence as "an insignificant collateral matter."

Moreover, the prosecutor's case against Hill was strong. Apodaca testified that he and Hill had a contentious relationship; she had struck him previously and he attempted to obtain a temporary restraining order against her. In addition, the jury acquitted Hill on count 4, suggesting that any error in admitting the rebuttal testimony was harmless.

We also reject Hill's contention regarding the Confrontation Clause because she did not object to the evidence on this basis at trial. Thus she has forfeited the claim. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166.) Forfeiture aside, *Crawford v.*

Washington (2004) 541 U.S. 36, 53-54, precludes "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Here Hill possessed a prior opportunity to cross-examine her mother regarding the assault but waived that constitutional right when she pleaded nolo contendere to misdemeanor elder abuse.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Allan L. Steele, Judge

Superior Court County of Ventura

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Defendant and Appellant.

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